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UNDERSTOOD): IMPARTIALITY AND THE
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COURTROOM

Laura Victorelli

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THE RIGHT TO BE HEARD (AND UNDERSTOOD): IMPARTIALITY AND THE EFFECT OF SOCIOLINGUISTIC BIAS IN THE COURTROOM

Laura Victorelli*

Working for Justice can take many forms, but for linguists, we believe it should include listening to vernacular dialects more closely and hearing their speakers more clearly and more fairly, not only in courtrooms, but also in schools, job interviews, apartment searches, doctors' visits, and everywhere that speech and language matter.

—John Rickford, “Language and Linguistics on Trial”¹

In our courts, when it's a white man's word against a black man's, the white man always wins. They're ugly, but those are the facts of life . . . the one place where a man ought to get a square deal is a courtroom, be he any color of the rainbow, but people have a way of carrying their resentments right into a jury box.

—Atticus Finch in Harper Lee's *To Kill a Mockingbird*²

The Supreme Court has held that the promise of equality to all citizens of the United States, regardless of color, means criminal defendants of all colors have the right to an impartial jury.³ Over time, however, this impartiality has come into question, especially in the age of the Civil Rights and Black Lives Matter

* Candidate for J.D., 2019, University of Pittsburgh School of Law.

¹ John R. Rickford & Sharese King, *Language and Linguistics on Trial: Hearing Rachel Jeantel (and Other Vernacular Speakers) in the Courtroom and Beyond*, 92 *LANGUAGE* 948, 949 (2016).

² HARPER LEE, *TO KILL A MOCKINGBIRD* 220–21 (1960).

³ Ashok Chandran, *Color in the Black Box: Addressing Racism in Juror Deliberations*, 5 *COLUM. J. RACE & L.* 28, 45 (2014).

Movements.⁴ Studies show that most Americans exhibit automatic preferences for white people and biases against black people.⁵ In fact, research indicates that whites who kill black people are twice as likely to be exonerated than blacks who kill whites in stand-your-ground jurisdictions.⁶

The consequences of these biases affect the fairness of trials involving both defendants of color and plaintiffs of color. One such example is Trayvon Martin, who was shot and killed by George Zimmerman while walking in his Florida neighborhood.⁷ Throughout the country, skeptical Americans questioned the impartiality of the Trayvon Martin trial and those of other black plaintiffs and defendants.⁸

Naturally, impartiality must come from all actors of a trial, from judges, to prosecutors, to jurors to achieve a fair and just result. However, achieving this vital impartiality is nearly impossible when jurors have preconceived notions of race. While many people may not admit to their inherent racism, or even recognize it, there are certain cultural norms and differences that affect the way we make decisions. Our inherent biases come in as one of the several complex, “psychological processes in which jurors must attend to information, evaluate theories, resolve inconsistencies, and persuade one another in the pursuit of a verdict.”⁹ In short, when an unknown or unaddressed bias enters this equation, it undermines impartial results.

Though both black and white jurors have innate biases, the racial makeup of jury boxes and defendants in the United States makes white biases against black defendants especially problematic.¹⁰ Because most jurors are white, and most

⁴ See generally Aliza Plener Cover, *Hybrid Jury Strikes*, 52 HARV. C.R.-C.L. L. REV. 357 (2017).

⁵ See generally Devon W. Carbado & Cheryl I. Harris, *The New Racial Preferences*, 96 CALIF. L. REV. 1139 (2008).

⁶ John K. Roman & Shebani Rao, *The Logic of Racial Disparities*, REAL CLEAR POLICY (July 18, 2013), https://www.realclearpolicy.com/articles/2013/07/19/the_logic_of_racial_disparities_575.html.

⁷ Greg Botelho, *What Happened the Night Trayvon Martin Died*, CNN (May 23, 2012), <https://www.cnn.com/2012/05/18/justice/florida-teen-shooting-details/index.html>.

⁸ See generally *id.*

⁹ Samuel R. Sommers & Phoebe C. Ellsworth, *Race in the Courtroom: Perceptions of Guilt and Dispositional Attributions*, 26 PERSONALITY & SOC. PSYCHOL. BULL. 1367, 1367 (2000).

¹⁰ Samuel R. Sommers & Phoebe C. Ellsworth, *White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom*, 7 PSYCHOL., PUB. POL’Y, & L. 201, 202 (2001).

defendants are black, white juror bias is more consequential and dangerous than bias demonstrated by black jurors.¹¹

This Note explores the ways in which sociolinguistics, specifically black speech, triggers juror biases and affects the impartiality of jury decisions. Specifically, it explores the way African American Vernacular English (“AAVE”) is perceived by white jurors and how these perceptions can potentially affect verdicts when there is a black plaintiff or defendant involved. Section I of this Note will give an overview of sociolinguistics and its effect on racial biases. Section II will describe the long-studied history of biases exhibited by white juries against black plaintiffs and defendants. Section III will merge these concepts and discuss the implications of sociolinguistics in the courtroom. Finally, Section IV will propose some possible solutions to prevent inherent biases triggered by speech perceptions from entering into the courtroom.

I. AN OVERVIEW OF SOCIOLINGUISTICS

Sociolinguistics is the study of the way people speak.¹² Specifically, it is “a branch of linguistics which studies the ways in which language is integrated with human society . . . with reference to such notions as race, ethnicity, class, sex, and social institutions.”¹³ Sociolinguistics refers to the way humans experience speech along with co-existent information and expectations when hearing spoken language.¹⁴ When we encode and retain auditory information, we are also encoding the social biases triggered when a spoken language is different from our own.¹⁵

One vital concept to the understanding of language bias is “social weighting.” Social weighting refers to the idea that, “[j]ust as the color of one’s skin or education level might, however, unjustly, influence our behavior, voice cues activate the same social biases and influence behavior in a similar manner.”¹⁶ Voice cues can influence the behavior and opinion of the listener, regardless of whether the speaker is out in public or on the witness stand. When we experience sociolinguistic bias, it triggers

¹¹ *Id.*

¹² EDMUND T. SPENCER, *SOCIOLINGUISTICS*, at vii (UK ed. 2010).

¹³ *Id.*

¹⁴ Meghan Sumner, *The Social Weight of Spoken Words*, 19 *TRENDS IN COGNITIVE SCI.* 238, 238 (2015).

¹⁵ *Id.* at 239.

¹⁶ *Id.*

a much darker prejudice—one that has haunted the American justice system for centuries—a racial bias.

Although we might not realize it, the way people speak can ignite and reinforce preconceived notions of an individual’s intellectual abilities.¹⁷ According to linguist John Rickford, who has researched sociolinguistics in African American communities, “[b]ecause people seem to agree that language is this profound mark of education and worth . . . you can often beat up on it when you want to beat up on other aspects of people without fear of being criticized.”¹⁸ In other words, because we learn from an early age that the way someone speaks is a socially acceptable way to judge their intelligence, it is easier for us to critique that aspect of their person, rather than their heritage, gender, sexual orientation, or race.¹⁹

In this way, sociolinguistics exacerbates the structural racism that is already present in the minds of white jurors. According to the Aspen Institute, structural racism is:

[a] system in which public policies, institutional practices, cultural representations, and other norms work in various, often reinforcing ways to perpetuate racial group inequality [and] . . . identifies dimensions of our history and culture that have allowed privileges associated with ‘whiteness’ and disadvantages associated with ‘color’ to endure and adapt over time.²⁰

In other words, it is the systematic way in which white people are privileged and people of color are disadvantaged through our cultural, economic, and institutional architecture. This type of racism has plagued the United States since its inception and continues to infect every stitch in the fabric of our country’s being.

The courtroom is a microcosm of this country, which can ignite the development of racial tensions outside of individual consciousness to create

¹⁷ See generally *Language on Trial: Rachel Jeantel*, WBUR (Here & Now radio broadcast June 28, 2013), <http://www.wbur.org/hereandnow/2013/06/28/n-word-language>.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Glossary for Understanding the Dismantling Structural Racism/Promoting Racial Equity Analysis*, ASPEN INSTITUTE (July 11, 2016), <https://assets.aspeninstitute.org/content/uploads/files/content/docs/rcc/RCC-Structural-Racism-Glossary.pdf>.

structural racism, which then, in turn, permeates every aspect of a trial.²¹ The idea of structural racism suggests a move from interpersonal prejudice to the entire society, which reinforces white privilege.²² Structural racism also explains the different ideological views held by blacks and whites, namely that, “for whites, racism is a question of individual prejudice, whereas for nonwhites, the issue is systematic or institutional.”²³

Structural racism is born not only from the blatant racism expressed by generations of white Americans, but also from the way we think and talk about race. Even in their most basic connotations, “black” and “white” have specific meanings and associations within the English language. “Black is associated with sinister, threatening concepts, while white attaches its meaning to cleanliness, innocence, and purity.”²⁴ Darkness is associated with danger, threat, dishonesty, and immorality, and therefore, implies a need to sequester something dark, which scholars argue is demonstrated by post-Civil Rights incarceration rates.²⁵

Racial vocabulary is even built into the very documents our country was founded on, including constitutions, court opinions, and statutes, which inherently influence the way Americans perceive one another.²⁶ One illustration is the Constitution of the United States. Although slavery was abolished by the Thirteenth Amendment, there are several hints towards America’s history of slavery within the document our country was founded on.²⁷ For example, Article 1, Section 9 of the Constitution states that “[t]he Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress . . . , but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.”²⁸

Considering that the highest law of the United States contains words that contemplate the existence of slavery, it is easy to conclude that this country has a

²¹ SpearIt, *Why Obama is Black: Language, Law and Structures of Power*, 1 COLUM. J. RACE & L. 468, 476 (2012).

²² *Id.* at 476.

²³ *Id.* at 477.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 471.

²⁷ U.S. CONST. amend XIII, § 1.

²⁸ *Id.* art. I, § 9.

troubled relationship between language and race relations. However, it is not only the way we think about these words, but also how we interpret the speech of people of other races that triggers this structural bias against black plaintiffs and defendants. As Matsuda notes, “[w]hen we hear a different voice we are likely to devalue it, particularly when it triggers the collective xenophobic unconscious that is the ironic legacy of a nation populated largely by people from other continents.”²⁹ To get a better understanding of the relationship between race and language, linguists have studied speech patterns and the societal implications of those patterns.

William Labov, a linguist whose life’s work grew out of the study of African American Vernacular English, conducted a study in 1966 that showed the linguistic differences between African American speech and white speech at the time, called, “The Harlem Report.”³⁰ The goal of the study was to improve the teaching of reading and writing to minority speakers, allowing them to better advocate on their own behalf in courts.³¹ Unlike other sociolinguistic studies at the time, Labov introduced the use of peer group recordings³² to elicit casual speech from the participants.³³ He found that the structural differences between black participants and white teenagers from Inwood Manhattan included about a dozen phonological features³⁴ and ten or eleven grammatical features.³⁵ Surely, ten or eleven grammatical features might change the way one perceives an individual of another race or ethnic group, as it is an easy way to differentiate one group from another.

As both Labov and Rickford note, contrary to popular belief, African American Vernacular English, like Creole English and Jamaican English, are systematic

²⁹ Mari J. Matsuda, *Voice of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329, 1372 (1991).

³⁰ John R. Rickford, *Labov’s Contributions to the Study of African American Vernacular English: Pursuing Linguistic and Social Equity*, 20 J. SOCIOLINGUISTICS 561, 562 (2016).

³¹ *Id.* at 561.

³² Peer group recordings are recordings of speakers talking to their friends in order to get a better reading of their natural tone, rather than a formal speaking voice.

³³ Rickford, *supra* note 30.

³⁴ See CARLOS GUSSENHOVEN & HAIKE JACOBS, UNDERSTANDING PHONOLOGY 10 (4th ed. 2017) (“Phonology is the branch of linguistics that aims to describe the way in which this medium of human vocal sound is structured, in languages generally as well as in individual languages.”).

³⁵ Rickford, *supra* note 30, at 563.

languages with their own rules and patterns.³⁶ Rather than indicating a problem with one's education or learning ability, African American Vernacular English is common in children who are what linguists call "bi-dialectal," meaning they can fluently speak and understand more than one dialect.³⁷ The irony is that American culture and education systems value bilingualism, yet ostracize those who speak and understand multiple dialects.

In his article, "Logic of Non-Standard English," Labov rebuts the contention that African American inner-city children were non-verbal or spoke a deficient form of English.³⁸ Rather, he notes that these incorrect conclusions can result from the misdiagnoses of linguistic aspects and cause non-speakers of African American Vernacular English to fall back on the assumption that there is a difference in genetics and/or IQ between themselves and speakers of AAVE.³⁹ Other scholars have noted that, in addition to the misconception that people who speak African American Vernacular English are in some way uneducated, there is also the misbelief that speakers of non-standard English are of poor character.⁴⁰ As a result, mischaracterizations can influence the impartiality of white juries when they are faced with speakers of African American Vernacular English in the courtroom; the white jurors may consider this type of speech an indication of someone's character, and ultimately, their innocence or guilt.

II. A HISTORY OF WHITE JURIES AND BLACK DEFENDANTS

Recent statistics on racial issues in the criminal justice system are striking. To give an example: "Whites who kill Blacks are over four times as likely to be exonerated under stand-your-ground protections as Blacks who kill Whites in the same jurisdictions."⁴¹ As several scholars and legal professionals have noted, the

³⁶ Patt Morrison, *Patt Morrison Asks: Stanford Linguistics Professor John Rickford on the Legacy of Ebonics*, L.A. TIMES (Aug. 24, 2016), <http://www.latimes.com/opinion/op-ed/la-oe-patt-morrison-asks-john-rickford-20160823-snap-story.html>.

³⁷ *Id.*

³⁸ William Labov, *The Logic of Nonstandard English*, 22 MONOGRAPH SERIES ON LANGUAGES & LINGUISTICS, 1969, at 1, 2.

³⁹ *See generally id.*

⁴⁰ Marguerite Rigoglioso, *Stanford Linguist Says Prejudice Toward African American Dialect Can Result in Unfair Rulings*, STANFORD (Dec. 2, 2014), <http://news.stanford.edu/news/2014/december/vernacular-trial-testimony-120214.html>.

⁴¹ Chandran, *supra* note 3, at 48.

current system does not address the effects of implicit biases in the courtroom, leaving the fate of defendants and plaintiffs of color at risk.⁴²

The idea of trial by an impartial jury is at the core of the American criminal justice system, as codified by the Sixth Amendment.⁴³ However, despite this ideal, racism often has a profound effect on the administration of criminal law and procedure.⁴⁴ Many studies show that white jurors express bias against black defendants.⁴⁵ This inherent bias originates in two places: the first is in-group behavior, and the second is the change in the nature of racism throughout history.

In-group bias refers to the idea that people attribute good behavior to situational forces to make a connection to jurors.⁴⁶ Thus, jurors will attribute criminal behaviors of a same-race defendant to situational pressures while linking the same criminal behavior of a different racial group to an inherent disposition.⁴⁷

Many scholars argue that while racial norms continue to influence juror decisions, those norms have changed over time,⁴⁸ specifically, white jurors' attitudes and perceptions of trials involving black defendants have changed.⁴⁹ As Sommers and Ellsworth note, "[r]un-of-the-mill trials of black defendants in which racial issues are not obvious are more likely to elicit prejudicial responses from whites."⁵⁰ This is because when there are racial issues in a trial, white jurors are reminded that they "should avoid prejudice, and these jurors will adjust their judgments of Black defendants accordingly."⁵¹ However, this does not mean that racism has somehow

⁴² See, e.g., Carol Izumi, *New Directions in ADR and Clinical Legal Education: Implicit Bias and the Illusion of Mediator Neutrality*, 34 WASH. U. J.L. & POL'Y 71, 86–87 (2010) ("In contexts such as peremptory challenges, judicial decision-making, employment, and jury selection, scholars argue that current procedural and substantive legal protections fail to account for the operation of unconscious biases.").

⁴³ U.S. CONST. amend VI.

⁴⁴ Chandran, *supra* note 3, at 28.

⁴⁵ See, e.g., Sommers & Ellsworth, *supra* note 9.

⁴⁶ *Id.* at 1368.

⁴⁷ *Id.* (citing Thomas F. Pettigrew, *The Ultimate Attribution Error: Extending Alport's Cognitive Analysis of Prejudice*, 5 PERSONALITY & SOC. PSYCHOL. BULL. 461–76 (1979)).

⁴⁸ See generally Sommers & Ellsworth, *supra* note 9.

⁴⁹ *Id.* at 1371.

⁵⁰ Sommers & Ellsworth, *supra* note 10, at 203.

⁵¹ *Id.*

been cured or no longer exists in the minds and hearts of white jurors. Rather, they are suppressing their internal biases, and as a result, their biases are triggered by other external factors when race is not necessarily an emphasized aspect of a trial. One such trigger is language.

Sommers and Ellsworth conducted a study in an interracial mock trial with both race-salient issues and non-race-salient issues.⁵² Race-salient trials are those in which the defendant is being charged with a crime that arose from a racial issue, such as a hate crime.⁵³ Non-race-salient trials are those involving issues without an emphasis on race.⁵⁴ Through the study, Sommers and Ellsworth found that white mock jurors rated the black defendant guiltier, more aggressive, and more violent than the white defendant.⁵⁵ When race was a main issue in the mock trial, however, white mock jurors were conscious of their own biases and overcompensated to acquit the black defendant in order to maintain an appearance of fairness.⁵⁶ This result emphasizes the contention that racism has moved from an open, socially acceptable mindset to a more covert problem. This would seem to suggest that rather than expressing racism openly and freely, white jurors now mask their biases with other aspects of the plaintiff or defendant of color. Importantly for this Note, one of those aspects is language.

It is this implicit bias in white jurors that is triggered by sociolinguistics and the way defendants and plaintiffs of color speak. To get a better understanding of exactly how these biases are triggered through language, the next section will discuss a specific example of a trial, which John Rickford of Stanford University and others have studied on a linguistic level.

III. SOCIOLINGUISTICS IN THE COURTROOM—TRAYVON MARTIN

Rachel Jeantel was the prosecution's leading witness in the Trayvon Martin trial, in which George Zimmerman was prosecuted for shooting and killing Martin in a Florida neighborhood.⁵⁷ According to linguist John Rickford, her testimony was

⁵² See Sommers & Ellsworth, *supra* note 9.

⁵³ See generally *id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 1374.

⁵⁶ *Id.* at 1376.

⁵⁷ Rickford & King, *supra* note 1, at 948.

dismissed as “incomprehensible and not credible” because she spoke a form of African American Vernacular English.⁵⁸ The different factors that contributed to the misunderstanding between the jury and Jeantel were born from the dialect difference and the white jurors’ unfamiliarity with it, Jeantel’s underbite and voice quality, implicit biases against her dialect, and institutionalized racism in the minds of the jurors.⁵⁹ As Rickford notes, “particularly in formal settings, unfamiliarity with and negative attitudes toward vernacular speech rendered Jeantel simply ignorant in the eyes of the jury—and therefore not a credible witness.”⁶⁰ It is noted that the ignorance and hostility toward Jeantel’s testimony led to a non-guilty verdict. Jeantel may have been better understood and viewed as more credible by a jury less dismissive of African American Vernacular English.⁶¹

Throughout the six-hour testimony given by Jeantel, she spoke a regular variety of African American Vernacular English.⁶² Below are several examples of the speech patterns expressed in Jeantel’s speech:

“I was bin paying attention, sir,” meaning, “I’ve been paying attention for a long time, and am still paying attention.”⁶³

“He had ax me did I go to the hospital,” meaning, “He asked me whether I had gone to the hospital.”⁶⁴

“He __ by the area where his daddy fiancée house is.”⁶⁵

Rickford noted, along with the examples above, that the relentless examination of Jeantel by prosecutor Bernie de la Rionda demonstrated the dialectal differences between Jeantel and the members of the jury.⁶⁶ During her testimony, Jeantel said that when she was on the phone with Martin on the night of his death she heard

⁵⁸ *Id.*

⁵⁹ *Id.* at 952.

⁶⁰ Riglioso, *supra* note 40.

⁶¹ *Id.*

⁶² Rickford & King, *supra* note 1, at 950–51.

⁶³ Rigoglioso, *supra* note 40.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

someone say, “Get off!”⁶⁷ When Rionda asked her who was saying that, the transcript reads “I couldn’t know Trayvon.”⁶⁸ Perhaps a typical reading of this might interpret this phrase to mean “I don’t know Trayvon,” or “I couldn’t have known whether it was Trayvon or not.” However, through Rickford’s linguistic analysis, he discovered that she was actually saying “I could, an’ it was Trayvon.”⁶⁹ Clearly, this misunderstanding could have easily changed the perceptions of the jury members, who were listening to the storytelling without the critical understanding that Jeantel stated it was Trayvon who was defending himself, rather than Zimmerman.⁷⁰

It is not only the misunderstanding of Jeantel’s testimony, but her perceived attitude towards those questioning her during the trial that made the jury skeptical of her judgement, and ultimately, her credibility.⁷¹ However, it is my interpretation of the testimony that Jeantel’s frustration and perceived attitude may have been born of frustration with the lawyers’ lack of understanding of her words. At one point during the trial, she noted that, “[d]a’s how I speak. He cannot hear me that well.”⁷² This frustration is likely what contributed to the jury’s perception of Jeantel’s attitude.

It is often difficult to understand what is going on in the minds of the jurors, and thus, biases are difficult to prove. However, in the case of Rachel Jeantel, there were interviews conducted with jury members that explained the sociolinguistic issue perfectly.⁷³ After the trial, Juror B37 said in a TV interview with CNN’s Anderson Cooper that she found Jeantel both “hard to understand, and not credible.”⁷⁴ She also informed Cooper that during the 16+ hours of juror deliberations, not one juror mentioned Jeantel.⁷⁵ When asked if they found Jeantel to be a credible witness, Juror B37 said no.⁷⁶ However, when Rickford and King studied the 15 hours of trial-related events, they found that Jeantel’s speech was neither

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Rickford & King, *supra* note 1, at 967.

⁷¹ *Id.* at 951.

⁷² *Id.* at 948.

⁷³ Rigoglioso, *supra* note 40.

⁷⁴ *Id.* at 950.

⁷⁵ *Id.*

⁷⁶ *Id.* at 971.

“inarticulate nor incoherent.”⁷⁷ In fact, they noted that the variation in her language was “systematic and not random.”⁷⁸

Khalil Gibran Muhammed, director of the Schomburg Center of Research in Black Culture at the New York Library, stated that the scrutiny that Jeantel faced was about class and power.⁷⁹ He noted that “[s]he might be subjected to even higher scrutiny by African Americans because she is expected to be representing the black community . . . speaking proper English is bound up with black respectability.”⁸⁰

Rickford’s assertion is that it is up to jurors and the court to make an effort to understand black defendants and witnesses, and understanding is not easily achieved when speakers of non-standard dialects of English do not get access to translators as speakers of foreign languages do.⁸¹ However, this solution does not seem to address all of the previously mentioned concerns. This is because, as this Note asserts, the problem is often two-fold. The issue is not only that the jury cannot understand speakers of African American Vernacular English, but that the jurors’ bias towards African Americans is triggered by these linguistic cues. Rickford himself noted research showing that non-native or vernacular speakers are less believed because of “social prejudice rather than mere lack of comprehension on the part of the listener.”⁸² Therefore, a comprehensive solution must include *more* than translators and trial transcripts (although these are important tools, as well).

IV. SOLUTIONS AND RECOMMENDATIONS

To combat racist perceptions of other people’s speech, this Note suggests three solutions: awareness and training for attorneys and judges, transcripts and translators, and representative juries, with a special focus on post-trial examinations of juror selection. While awareness and training, as well as transcripts and translators, are important steps to take in combating sociolinguistic bias, a special focus must be placed on getting more representative juries and improving the current system for post-trial examination of juror selection.

⁷⁷ *Id.* at 957.

⁷⁸ *Id.* at 970.

⁷⁹ *Language on Trial Broadcast*, *supra* note 17.

⁸⁰ *Id.*

⁸¹ Rigoglioso, *supra* note 40.

⁸² *Id.*

The solutions and recommendations given in this Note are not all-encompassing, and there is much more that can be done to eliminate structural racism in the American criminal justice system. Rather, these ideas are meant as a spring board for continued research, and to bring this issue to the attention of law students, attorneys, courts, and other legal professionals. Thus, these suggestions are more about familiarizing the legal world with sociolinguistics and the great power it can have on jury decisions.

A. Awareness & Training

Currently, lawyers and judges are almost completely uninformed about sociolinguistics and the challenges it presents to conducting fair trials, especially when the trial involves defendants or plaintiffs of color and white jurors.⁸³ One commonly recommended solution, therefore, is bias training for prosecutors and judges.⁸⁴ This training would teach those in the courtroom about the prevalence of unconscious stereotypes, which, in turn, could help create a more neutral jury selection.⁸⁵ Informal linguistic bias training could also be conducted at Continuing Legal Education programs to increase awareness in the legal field beyond the courtroom.

In recent years, the San Francisco Public Defenders Office underwent an overhaul, which involved training on implicit biases, such as those addressed in this Note.⁸⁶ With these “practical safeguards,” employees of this office “are encouraged to seek feedback from colleagues about potential biases and use checklist tools that ask questions such as ‘how would I handle this case different if my client was another race or had a different social background?’”⁸⁷ Through this training, several public defenders were able to address their unconscious biases in a productive way to do their job more effectively and to better defend their clients.⁸⁸ Implementing training, like that in San Francisco, in Continuing Legal Education programs throughout the country could help prevent the impact sociolinguistic bias brings to the courtroom.

⁸³ Rickford & King, *supra* note 1, at 951.

⁸⁴ Alafair S. Burke, *Prosecutors and Peremptories*, 97 IOWA L. REV. 1467, 1483 (2012).

⁸⁵ *Id.*

⁸⁶ Jeff Adachi, *Public Defenders Can Be Biased, Too, and It Hurts Their Non-White Clients*, WASH. POST (June 7, 2016), https://www.washingtonpost.com/posteverything/wp/2016/06/07/public-defenders-can-be-biased-too-and-it-hurts-their-non-white-clients/?noredirect=on&utm_term=.79adcbb8ad3a.

⁸⁷ *Id.*

⁸⁸ *Id.*

B. *Transcripts and Translators*

As Rickford notes, another solution is to provide jurors with transcripts and to have linguists help with transcripts of vernacular dialect speakers before jurors get them.⁸⁹ This would allow linguists to play a larger role in courtroom proceedings and could prevent any miscommunication between the jury and those testifying on the witness stand. As Roger Shuy notes in his article, “Language in the American Courtroom,” a linguist’s role in the courtroom would be to ensure that written transcripts given to a jury, “accurately represent the spoken language.”⁹⁰ While the role of linguists in the courtroom is clearly not a new phenomenon, it has not been fully accepted by the American court system.⁹¹ Emphasis on this role and expanding linguists’ involvement in interpreting courtroom proceedings would give black plaintiffs, defendants, and witnesses a greater opportunity to be heard.

C. *Representative Juries and Post-Trial Examinations into Juror Bias*

Perhaps the most effective way of solving the issue of sociolinguistic bias in the courtroom is to assemble more representative juries that include members of *all* races, rather than all or mostly white members. It is Rickford’s belief that, had there been an African American on the jury during the Trayvon Martin trial (someone more familiar with African American Vernacular English and less likely to link it with biases to Jeantel’s personality traits and credibility), then Jeantel’s testimony would have been seen as more believable to the jurors.⁹² For example, had there been a black person on the jury (or preferably, several black people), they may have spoken a similar form of African American Vernacular English and thus would have been less likely to discount Jeantel’s testimony. Perhaps they could even have acted as informal translators by explaining what certain African American Vernacular English sentences meant in Standard English when deliberating with their fellow jurors.

One way to include more jurors of color is to end peremptory strikes against African Americans during voir dire. Judges today tend to give prosecutors the benefit of the doubt when they offer race-neutral justifications for the exclusion of black

⁸⁹ Rickford & King, *supra* note 1, at 982.

⁹⁰ Roger W. Shuy, *Language in the American Courtroom*, 1 LANGUAGE & LINGUISTICS COMPASS 100, 102 (2007).

⁹¹ *Id.* at 100–01.

⁹² Rickford & King, *supra* note 1, at 978.

jurors,⁹³ but these increased exclusions are creating juries that favor one race over another. Unlike the Canadian system, in which jurors are selected without any questioning at all and peremptory decisions are made solely on the basis of physical characteristics and demeanor of the juror,⁹⁴ the American system goes through a long line of juror questioning.⁹⁵ It is this Note's assertion that this questioning allows prosecutors to exclude black jurors through more "justified" means than would be available if they were deciding based only on the physical characteristics of that juror.

In *Ham v. South Carolina*, the Supreme Court ruled that a trial judge has a constitutional duty to ask about racial bias during voir dire.⁹⁶ However, this ruling was later narrowed in *Ristaino v. Ross*, in which the Court ruled that courts must assess "whether under all of the circumstances presented there was a constitutionally significant likelihood that, absent questioning about racial prejudice, the jurors would not be as indifferent as they stand unsworn."⁹⁷ Finally, in *Rosales-Lopez v. United States*, the Court held that trial judges are only allowed to ask race-based questions when racial issues are "inextricably bound up with the conduct of the trial."⁹⁸

The ease with which prosecutors can exclude people of color from serving on juries, combined with restraints on trial judge's ability to exclude people with racial biases, creates a jury that is not representative of the community and will almost certainly contain biases against members of other races. In order to make salient the issue underlying unrepresentative juries and to give a brief history of how they have been treated in the past, it is necessary to look at specific case law.

One of the earliest cases involving the issue of unrepresentative juries was *Neal v. Del* in 1880.⁹⁹ In *Del*, both the Court of General Session and the Court of Oyer and Terminer selected no persons of color or African race to serve on the jury.¹⁰⁰

⁹³ Sommers & Ellsworth, *supra* note 10, at 207.

⁹⁴ Neil Vidmar, *The Canadian Criminal Jury: Searching for a Middle Ground*, 62 L. & CONTEMP. PROBS. 141, 150 (1999).

⁹⁵ *Id.* at 162.

⁹⁶ *Ham v. South Carolina*, 409 U.S. 526–27 (1973).

⁹⁷ *Ristaino v. Ross*, 424 U.S. 589, 596 (1973).

⁹⁸ *Rosales-Lopez v. United States*, 451 U.S. 182, 189 (1981).

⁹⁹ *See generally* *Neal v. Delaware*, 103 U.S. 370 (1880).

¹⁰⁰ *Id.* at 387.

Prior to reaching the Supreme Court, the lower courts found that in order to find that a court purposefully excluded people of color from a jury, so as to deprive a defendant of equal protection under the law, it must appear that the jury must appear to have been composed “solely of white men . . . because the names of colored men were not selected for jury service on the ground of their race and color.”¹⁰¹ In addition, under this ruling, the defendant must show that the specific laws of the state specifically prohibit people of color from serving on juries.¹⁰² However, in the end, the Supreme Court held that the defendant had met his burden of showing that no black man had ever served as a juror in Delaware, and this established a potential equal protection violation.¹⁰³ This was a huge step forward in the fight for representative juries, but it was still a high burden, placed solely on the defendant, to show that there was systematic and comprehensive racism in the jury selection process.¹⁰⁴

While the Supreme Court was moving towards favoring more representative juries, state courts continued to justify unequal protection of the law through unrepresentative juries.¹⁰⁵ For example, in *Norris v. State*, the defendant contended that his rights were violated by the exclusion of blacks from the grand jury and the trial venire under the provisions of the Alabama Code.¹⁰⁶ The lower court held, and the Alabama Supreme Court affirmed, that, “a mixed jury, some of which shall be made of the same race with the accused, cannot be demanded, as of right, in any case; nor is a jury of that character guaranteed by the Fourteenth Amendment.”¹⁰⁷ Rather, the court held that,

[w]hat an accused is entitled to demand, under the Constitution of the United States, is that, in organizing the grand jury as well as in the impaneling of the petit

¹⁰¹ *Id.*

¹⁰² *Id.* at 397.

¹⁰³ *Id.* at 393–94.

¹⁰⁴ *Id.*

¹⁰⁵ See generally *Norris v. State*, 229 Ala. 226 (1934).

¹⁰⁶ *Id.* at 230–31.

¹⁰⁷ *Id.* at 231.

jury, there shall be no exclusion of his race, and no discrimination against them, because of their race or color.¹⁰⁸

With a mixed history and vague, ever-changing standards, the issue of unrepresentative juries has been very controversial.¹⁰⁹ Therefore, the review process for these cases is very important. *Batson v. Kentucky* is probably one of the most well-known cases for overturning a guilty verdict of a black defendant because of the purposeful discrimination and racism exercised by the prosecution during voir dire.¹¹⁰ In that case, the prosecutor used peremptory challenges to block all people of color from serving on the jury.¹¹¹ In the end, only white jurors were selected to serve.¹¹²

Upon review of the trial, the Court held that, “[e]xclusions of black citizens from service as jurors constitutes a primary example of the evil the Fourteenth Amendment was designed to cure.”¹¹³ They went on to say that “[t]he Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race, or on the false assumption that members of his race as a group are not qualified to serve as jurors.”¹¹⁴

Batson provided a test in order to determine whether bias was present during voir dire.¹¹⁵ First, a black defendant wishing to show discrimination in the voir dire process must make a prima facie case of purposeful discrimination by showing that the “totality of the relevant facts gives rise to an inference of discriminatory purpose.”¹¹⁶ Next, a defendant must show that they are a member of a racial group that has been singled out for differential treatment by showing that members of their race have systematically been removed from jury service.¹¹⁷ Finally, the burden

¹⁰⁸ *Id.*

¹⁰⁹ See generally Sommers & Ellsworth, *supra* note 10.

¹¹⁰ See generally *Batson v. Kentucky*, 476 U.S. 79 (1986).

¹¹¹ *Id.* at 83.

¹¹² *Id.*

¹¹³ *Id.* at 84.

¹¹⁴ *Id.* at 86.

¹¹⁵ *Id.* at 93–95.

¹¹⁶ *Id.* at 93–94.

¹¹⁷ *Id.* at 94.

shifts to the prosecution to show that they did not use racial bias to exclude some members of that race from jury service.¹¹⁸

According to Burke, “[l]awyers . . . view Batson as a fiction because they have learned that the three-part test designed to prevent race-based peremptory challenges is toothless.”¹¹⁹ This is evidenced, he claims, by the fact that prosecutors continue to exercise peremptory challenges that disproportionately keep people of color from jury service.¹²⁰ In fact, the majority of appeals based on the case have been rejected.¹²¹

Rule 606 of the Federal Rules of Evidence also provides that,

[d]uring an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury’s deliberations; the effect of anything on that juror’s or another juror’s vote, or any juror’s mental processes concerning the verdict of indictment.¹²²

Three exceptions to this rule are extraneous prejudicial information that was improperly brought to the jury’s attention, an outside influence that was brought to bear on any juror or any mistake that was made in entering the verdict on the verdict form.¹²³

Despite these exceptions, this rule makes it extremely difficult for jurors to comment on the racism expressed by their fellow jurors behind closed doors. Additionally, the rule does not allow juror testimony to impeach the verdict.¹²⁴ Finally, in *Tanner v. United States*, it was held that an interference that was entirely

¹¹⁸ *Id.*

¹¹⁹ Burke, *supra* note 84, at 1469; Izumi, *supra* note 42, at 98–99 (“Looking at peremptory challenges, Anthony Page argues that the current three-step *Batson* approach is inadequate to address the phenomenon of racially motivated challenges in jury selection.”).

¹²⁰ Burke, *supra* note 84, at 1470.

¹²¹ *Id.*

¹²² FED. R. EVID. 606.

¹²³ *Id.*

¹²⁴ *Id.*

internal—such as conflicts between jurors or an individual juror’s bias or prejudice—was not reviewable after a verdict was rendered.¹²⁵

Pena-Rodriguez v. Colorado represents a breakthrough in the review of proceedings involving jury bias. In *Pena-Rodriguez*, the Colorado Supreme Court failed to review a case in which jury members relied on the personal testimony of a juror who claimed that in his experience as a former police officer, “Mexican men had a bravado that caused them to believe they could do whatever they wanted with women.”¹²⁶ However, when the case reached the Supreme Court, it reversed and remanded the decision because:

[a]lthough [the Colorado Rule of Evidence 606(b)] restricted the inquiry into the validity of a jury’s verdict, the Sixth Amendment of the U.S. Constitution required that the so-called ‘no impeachment rule’ give way in order to permit a trial court to consider evidence of a juror’s statement and any resulting denial of the jury trial guarantee in cases where a juror made a clear statement which indicated that he or she relied on racial stereotypes or animus to convict a defendant.¹²⁷

Despite the ruling in *Pena-Rodriguez*, the Fifth Circuit Court of Appeals failed to further extend the reach of the *Pena-Rodriguez* ruling in *Young v. Davis*.¹²⁸ Additionally, *Pena-Rodriguez*, like *Batson*, extends protection only to defendants and not plaintiffs of color.¹²⁹ Thus, *Batson* and Rule 606 of the Federal Rules of Evidence, while a step in the right direction, also present many challenges to overturning convictions due to juror bias. Because of the difficulty defendants and plaintiffs of color have in overturning these convictions and acquittals, it is important to prevent the bias from occurring in the first place by creating more representative juries.

There are many ways to facilitate the selection of representative juries. One solution to this problem is to adopt the Canadian system described above. Another is to create a blind voir dire process in which jurors are separated from the judge and lawyers during questioning, so as to avoid keeping members of a certain race from

¹²⁵ *Tanner v. United States*, 483 U.S. 107, 119 (1987).

¹²⁶ *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 862 (2017).

¹²⁷ *Id.* at 869.

¹²⁸ *Young v. Davis*, 860 F.3d 318, 334 (5th Cir. 2017).

¹²⁹ *Pena-Rodriguez*, 137 S. Ct. at 869.

servicing on the jury. These and several other solutions, including more novel solutions like hybrid strikes¹³⁰ and disparity of risk,¹³¹ have been proposed time and time again. However, until people in the legal community better understand why representative juries are important and the way biases, such as sociolinguistic biases, affect jury decisions, they are not likely to be implemented.

Again, these solutions and recommendations are not so much about curing the sociolinguistic issue in courtrooms overnight. Rather, they are meant to encourage further research, spark interests of those involved in the field, and most importantly, familiarize those working within the American justice system with this issue, which is so rarely talked about in law schools and continuing legal education programs.

CONCLUSION

Humans have biases, and as a result, any system that relies on people to make judgements of innocence and guilt is inevitably biased. It is only through education and deeper exploration of these tendencies that we will ever know enough to minimize these issues. As sociolinguists like John Rickford research into the future, we will build on our knowledge of this specific bias and be able to better address it in the courtroom, where impartiality is a right guaranteed by the Constitution. Doing so is critical in our criminal justice system, which provides all people, regardless of color, equal protection under the law.

¹³⁰ Cover, *supra* note 4, at 360 (“Like a traditional peremptory strike, a hybrid strike could be exercised on a discretionary basis without successfully establishing that a juror must be excluded for bias or other cause. But unlike a traditional peremptory strike, a hybrid strike could only be exercised after the ex-ante articulation of a race-neutral and meaningful argument for exclusion.”).

¹³¹ Peter A. Detre, *A Proposal for Measuring Underrepresentation in the Composition of the Jury Wheel*, 103 YALE L.J. 1913, 1930 (1994) (describing a new method that adequately measures “the extent to which a defendant’s ex-ante chances have been affected by the underrepresentation of a group on the jury wheel”).